

[J-96-2016]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

RICHARD A. SPRAGUE, HON. RONALD : No. 75 MAP 2016
D. CASTILLE AND HON. STEPHEN :
ZAPPALA, SR., :
: :
: :

Plaintiffs

v.

PEDRO A. CORTES, SECRETARY OF :
THE COMMONWEALTH OF :
PENNSYLVANIA, IN HIS OFFICIAL :
CAPACITY, :
: :

Defendant

**DISSENTING STATEMENT IN SUPPORT OF GRANT OF RECONSIDERATION AND
REMAND TO THE COMMONWEALTH COURT**

JUSTICE TODD

FILED: September 16, 2016

In these unprecedented and exceptional circumstances, I would grant Plaintiffs' Motion for Reconsideration and Correction of our Court's September 2, 2016 *per curiam* order and would remand this matter to the Commonwealth Court for expedited resolution, on the merits, of the manifestly important issue of whether this ballot question fairly, completely, and accurately apprises the voters of the constitutional change they are being asked to approve in the November election.

Specifically, the plaintiffs in this matter, Attorney Richard A. Sprague, the Honorable Ronald D. Castille, and the Honorable Stephen A. Zappala, have filed a motion for reconsideration of our prior order requesting that our Court remand the matter to the Commonwealth Court. In our Court's *per curiam* order, we explained that,

because the Court was evenly divided on the question of whether the parties were entitled to summary relief on their respective motions,¹ our Court was “without authority to grant relief and the *status quo* of the matter prior to the filing of the lawsuit is maintained.” Order, 9/2/16, at 1 (citing Creamer v. Twelve Common Pleas Judges, 281 A.2d 57 (Pa. 1971) (discussed more fully at length *infra*)). Nothing in our September 2 order, however, precludes the parties from seeking relief in the Commonwealth Court at this juncture, or prevents our Court from remanding the matter for a merits disposition.

It would appear, based on the averments in Plaintiffs’ motion and Defendant’s response, that this *per curiam* order has engendered confusion as to whether “maintaining the *status quo*” forecloses Plaintiffs’ right to seek further relief in the Commonwealth Court. See Plaintiffs’ Motion for Reconsideration at 5-6 (“This Court’s [sic] misguidedly relied on [Creamer] to quash Plaintiffs’ legal challenge and prevent them from ever having their day in Court to protect their rights and the rights of every Pennsylvania citizen to cast informed votes on proposed amendments to the Pennsylvania Constitution.”); Defendant’s Answer at 4 (“Plaintiffs’ request for relief failed when this Court entered a final adjudication (even if a split decision) ordering the *status quo*.”).

Our *per curiam* order does not bar Plaintiffs from seeking further relief in the Commonwealth Court. Because of the parties’ evident confusion regarding this order, and the public importance of a definitive resolution of the constitutional issue in this case — as to whose merits *no court of this Commonwealth* has yet rendered a

¹ Justices Baer, Donohue, and Mundy would have rejected Plaintiffs’ challenge to the ballot question. I, along with Justices Wecht and Dougherty, would have granted Plaintiffs’ application on the basis that the ballot question failed to fairly, completely, and accurately apprise voters of the nature of the constitutional changes on which they were voting.

dispositive final adjudication — it is imperative, under these highly unusual circumstances, to emphasize that our order maintaining the *status quo* should not be read as barring further proceedings in the Commonwealth Court. I would remand this case to that tribunal forthwith for expedited resolution.

The Majority's disposition is unsupported by any controlling legal authority, inasmuch as the case on which it principally relies, Creamer, does not support denying Plaintiffs their requested relief.² Creamer was a case involving the constitutionality of the Governor's appointment of judges to fill 14 judicial vacancies. The multiple plaintiffs in those cases challenging the Governor's exercise of his appointment power commenced their various actions in our Court through a variety of means, such as a *quo warranto* action, a petition for a writ of mandamus, and a petition to take original and plenary jurisdiction. 281 A.2d at 63 Therefore, unlike in the matter before us, the actions were brought in our Court's original jurisdiction — no proceedings were pending in any lower court at the time our Court exercised our King's Bench power and assumed plenary jurisdiction over all of these cases.

The 6 members of our Court, who heard that case, while agreeing with respect to 8 of the 14 appointments, became equally divided on the resolution of the question of whether the remaining 6 jurists had been properly appointed by the Governor. As the Court could not render a final judgment on the merits of that question, and because there were no proceedings pending in a lower court at the time we assumed jurisdiction,

² Plaintiffs do not seek reargument before our Court in order to have us reconsider the merits of our evenly divided decision; rather, they ask us to “reconsider, vacate and correct [our] September 2, 2016 Order dismissing this case due to the fact that the Justices of the Court are equally divided with respect to how the case should be resolved; and remand the case back to the Commonwealth Court.” Plaintiffs' Motion for Reconsideration, filed 9/2/16.

the effect of our Court's order was to leave in place the *status quo*, i.e., simply to terminate the litigation in our Court — where it began.

Further, nothing in our Court's *per curiam* order in Creamer, or the respective opinions of the justices in that case, foreclosed any further proceedings thereafter in any other tribunal with jurisdiction to consider anew the merits of the constitutional question which our Court did not decide. Quite simply, there was nothing of record indicating that the challengers in Creamer sought to pursue any such actions.

In contrast, this action began in the Commonwealth Court, and, thus, was pending in that court at the time we assumed jurisdiction. Therefore, our Court's inability to render a final judgment on the merits, i.e., our lack of authority to grant the requested relief to any of the parties due to the deadlock, leaves the action pending in the Commonwealth Court as the *status quo*. Hence, Creamer does not bar Plaintiffs from pursuing relief in the Commonwealth Court at present, and our Court's September 2, 2016 order did not expand the breadth of our holding in Creamer to automatically foreclose further proceedings in the Commonwealth Court in this matter, as the parties have apparently interpreted it. Clarifying this order to eliminate any misconception as to its lack of preclusive effect is, therefore, a compelling reason to grant reconsideration and allow remand of the matter to the Commonwealth Court.

Consistent with this understanding of Creamer, I reject the Majority's conclusion that "there is no longer an action pending in the lower court that requires further adjudication." Order, 9/16/16 at 4. Plaintiffs originally commenced this action in the Commonwealth Court on July 21, 2016, and, on that same day, requested that our Court exercise our extraordinary jurisdiction over the matter. We granted that request on July 27, 2016. Pursuant to Pa.R.A.P. 3309(d), our grant of extraordinary jurisdiction had the legal effect of transferring jurisdiction of this action to our Court and *halting* all

proceedings in the Commonwealth Court during the pendency of this matter before our Court. See Pa.R.A.P. 3309(d) (“Where action is taken under this rule which has the effect of transferring jurisdiction of a matter to the Supreme Court, unless otherwise ordered by the Supreme Court such action shall be deemed the taking of an appeal as of right for the purposes of Chapter 17 (effect of appeals; supersedeas and stays), except that the lower court shall not have the power to grant reconsideration.”); Pa.R.A.P. 1701(a) (“Except as otherwise prescribed by these rules, after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit *may no longer proceed further in the matter.*”(emphasis added)).

Had our Court rendered a dispositive final adjudication on the merits of the parties’ respective claims after assuming extraordinary jurisdiction, this action would have been finally concluded, and the Commonwealth Court, of course, could no longer conduct any further proceedings with respect thereto. Since our Court was evenly divided on the parties’ claims, and, thus, did not render a dispositive order finally adjudicating the claims on the merits, the Plaintiffs’ action filed in the Commonwealth Court prior to our Court’s exercise of extraordinary jurisdiction should re-attain the same posture which it was in when we originally assumed such jurisdiction. Thus, our Court’s September 2 order cannot be read as terminating Plaintiffs’ pending action in the Commonwealth Court, but, rather, permits a remand to that court for final adjudication of the parties’ claims on the merits.³

Finally, and in any event, Section 726 of the Judiciary Code requires our Court, once we have assumed extraordinary jurisdiction, to “enter a final order or otherwise

³ I consider the language in our order maintaining the *status quo* prior to the filing of the lawsuit as specifying that the ultimate merits of Plaintiffs’ constitutional claims regarding the wording of the ballot question remain as they were at that point in time, unresolved, and nothing more.

cause right and justice to be done.” 42 Pa.C.S. § 726. Since our Court has not entered a final order, i.e. one that “disposes of all claims and of all parties,” Pa.R.A.P. 341, our Court is mandated by Section 726 to otherwise “cause right and justice to be done.” None of the parties have received a final adjudication on the merits of their claims in this matter, and most importantly, the people of this Commonwealth are entitled to a prompt and definitive resolution by the judiciary of this critically important constitutional question. An immediate remand to the Commonwealth Court is the only available means at this late date which can accomplish such justice. Consequently, I deem it of the utmost importance to remand this matter for that tribunal to expeditiously undertake that task. Thus, I would grant Plaintiffs’ motion and would remand the matter to the Commonwealth Court.

Justice Wecht joins this Dissenting Statement.